

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD LORD and HELEN LORD : CIVIL ACTION
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LIVING BRIDGES, et al. : NO. 97-6355

MEMORANDUM ORDER

This is a "wrongful adoption" case. Plaintiffs allege that defendants misrepresented the history and condition of children whose adoption by plaintiffs was arranged or facilitated by defendants. Plaintiffs allege that defendants concealed the fact that these children had been seriously abused and had significant psychological problems despite being told by plaintiffs that they had health problems and were not capable of caring for children with special needs. Plaintiffs have asserted claims for fraudulent and negligent misrepresentation, for negligent nondisclosure and for intentional and negligent infliction of emotional distress.

Presently before the court is the motion of defendants Living Bridges, Juan Guerra, Robert Iatesta and Anna Iatesta for summary judgment.

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is

entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Further, in assessing a motion for summary judgment, the court must construe the evidence of record and all inferences reasonably drawn therefrom in a light most favorable to the non-movant. Anderson, 477 U.S. at 256.

To sustain an intentional or fraudulent misrepresentation claim, a plaintiff must show: a representation or omission; which was material to the transaction; made with knowledge of its falsity or reckless disregard for whether it was true or false; with the intent of misleading another into relying on it; justifiable reliance on the misrepresentation; and, an injury proximately caused by the reliance. Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994).

To establish negligent misrepresentation, a plaintiff must show: a misrepresentation of a material fact; the representor either knew of the misrepresentation, made the misrepresentation without knowledge of its truth or falsity or made the representation under circumstances in which he ought to have known of its falsity; the representor intended the representation to induce another to act on it; and, some injury which resulted to the party acting in justifiable reliance on the misrepresentation. Id. at 890. Thus, the representor may be

liable for failing to make a reasonable investigation of the truth of the representation. Id.

If credited by the factfinder, plaintiff's evidence is sufficient rationally to support findings establishing the elements of their misrepresentation claims. From the evidence viewed most favorably to plaintiffs, one could reasonably find the following facts.

While acting as officers or employees of Living Bridges, a nonprofit Pennsylvania corporation, the individual defendants represented that they had a strong and long relationship with Mexican orphanages and Mexican agencies involved with child placement and that they could facilitate plaintiffs' adoption of Mexican children. Plaintiffs "stressed that [they] needed children in good health" because they had a "history of health problems" and were not capable of caring for children with "special needs." Defendants represented that Living Bridges would honor plaintiffs' expressed limitation in matching them with adoptive children. They represented that the Mexican authorities with whom they had a close relationship had intimate knowledge of the children being placed and thus Living Bridges could make a suitable match between adopting parents and adopted children. They requested over \$5,000 for Living Bridge's "internal facilitation costs" and additional sums for adoption expenses, including \$800 per child for a Home Study and

psychological report. For at least two years prior to the interaction with plaintiffs, Living Bridges received funds from the Pennsylvania Department of Public Welfare to facilitate and support the adoption of Mexican and other Latin American children.

The Iatestas had hosted directors of the Villa Hogar orphanage for several days in Pennsylvania and had visited the orphanage on numerous occasions over the eight years preceding the placement of three children from the orphanage with plaintiffs. The Iatestas met with the three girls placed with plaintiffs at the orphanage prior to their adoption. The Iatestas told plaintiffs that Villa Hogar was a "premier" orphanage and the girls were "sweet and loving," were "bright" and "had not been abused." Plaintiffs relied on these representations in deciding to adopt the three young girls from Villa Hogar.

Villa Hogar actually housed primarily abused children, many of whom were victims of serious abuse. A report summarizing the background of the girls was prepared at the time of their admission to Villa Hogar in November 1990. It shows that the girls were the victims of physical abuse and in the case of one, physical torture. It shows that one of the girls had intellectual impairments, possible brain damage and psychological problems.

Almost immediately after the adoption, one of the children manifested symptoms of serious mental illness. She was diagnosed with post-traumatic stress disorder and required hospitalization in facilities for the mentally ill. Another of the girls was diagnosed with severe psychological problems and requires costly therapy and medication. Two of the girls have acted out in a violent manner, in some instances inflicting physical injury upon plaintiffs. Plaintiffs have incurred substantial financial obligations in addressing the children's special needs and severe emotional distress accompanied by headaches, hypertension, nausea, sleeplessness and in the case of Mr. Lord, arrhythmia and other cardiac problems.

From this evidence a reasonable factfinder could conclude that defendants intentionally or recklessly, as well as negligently, made material misrepresentations about the history and condition of at least two of the adopted children on which plaintiffs justifiably relied to take action which has resulted in loss or injury to them.

Defendants suggest that "the duties outlined by the Gibbs Court are not directly applicable to them" because Living Bridges was not an adoption agency or intermediary. Defendants misread Gibbs. The Court in Gibbs held that although adoption was unknown at common law, common law tort principles are nevertheless applicable in the adoption context. The Court held

that adopting parents could assert common law claims for intentional and negligent misrepresentation against child placement agencies although the Adoption Act did not create a private cause of action for a breach of a statutory duty by such an agency. See Gibbs, 647 A.2d at 888-89. The Court did not hold that unless a defendant is an adoption agency or intermediary, it cannot be liable for misrepresentations made in the course of encouraging and facilitating an adoption. Further, one cannot conclusively determine from the summary judgment record that Living Bridges was not operating as a placement agency or intermediary.

Living Bridges accepted public and private money to facilitate adoptions. Its principals represented that it was uniquely positioned to secure the placement of Mexican children for adoption. It was an intermediary between plaintiffs and those with legal and physical custody of the children, and it helped directly to effectuate the adoptions. It charged plaintiffs for the preparation of a Home Study, something which is the responsibility of an intermediary which arranges an adoption placement. See 23 Pa. C.S.A. § 2530(a).

Even assuming that Living Bridges was an adoption intermediary with statutory disclosure duties under 23 Pa. C.S.A. § 2533(b)(12), as plaintiffs assert, defendants are not liable for "negligent nondisclosure." The Adoption Act does not create

a private cause of action for a negligent breach of the duties it imposes and there is no independent cause of action for a negligent omission or "nondisclosure." See Lazin v. Pavilion Partners, 1995 WL 614018, *7 (E.D. Pa. Oct. 11, 1995) (Padova, J.).

The suggestion of defendants Robert and Anna Iatesta that they cannot be held personally liable because there is insufficient evidence to show Living Bridges is a "sham" corporation or to establish "the requisite elements for the extraordinary remedy of piercing the corporate veil" is also unavailing. It is simply not necessary to "pierce the corporate veil" to hold individual corporate employees liable for their own tortious conduct. See, e.g., Al-Khazraji v. St. Francis College, 784 F.2d 505, 518 (3d Cir. 1986) ("An individual, including a director, officer or agent of a corporation, may be liable for injuries suffered by third parties because of his torts, regardless of whether he acted on his own account or on behalf of the corporation"), aff'd, 481 U.S. 604, reh'g denied, 483 U.S. 1011 (1987); Johnson v. Resources for Human Development, Inc., 843 F. Supp. 974, 978 (E.D. Pa. 1994); Wilks v. Milzocko Builders, Inc., 470 A.2d 86, 89-90 (Pa. 1983); Francis J. Bernhardt, P.C. v. Needleman, 705 A.2d 875, 878 (Pa. Super. 1997) ("Under the participation theory, the court imposes liability on the individual as an actor rather than as an owner. Such

liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer").

To sustain a claim for intentional infliction of emotional distress, a plaintiff must show extreme and outrageous conduct which is deliberate or reckless and which causes severe emotional distress. See Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988), appeal after remand, 894 F.2d 647 (3d Cir. 1990), cert. denied, 498 U.S. 811 (1990); Bedford v. Southeastern Pa. Trans. Auth., 867 F. Supp. 288, 297 (E.D. Pa. 1994); Kazatsky v. King David Memorial Park, Inc., 527 A.2d 988, 991 (Pa. 1987). The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Hoy v. Angelone, 720 A.2d 745, 753-54 (Pa. 1998). See also Clark v. Township of Falls, 890 F.2d 611, 623 (3d Cir. 1989); Bedford, 867 F. Supp. at 297; Kazatsky, 527 A.2d at 991.

The court must preliminarily determine whether a defendant's conduct was sufficiently extreme and outrageous as to permit recovery. Cox, 861 F.2d at 395; Restatement (Second) of Torts § 46, cmt. h. "Where reasonable persons may differ, it is for the jury to determine whether the conduct is sufficiently

extreme and outrageous so as to result in liability." Motheral v. Burkhardt, 583 A.2d 1180, 1188 (Pa. Super. 1990).

The state Supreme Court has characterized "the knowing provision of false information by adoption intermediaries to prospective parents so as to induce them to accept a particular child" as "reprehensible." Gibbs, 647 A.2d at 890. The Court has noted that false or misleading information about the medical condition or prior physical abuse of adopted children may have "devastating" results. Id. at 887 & n.8. Someone involved with child placement must appreciate that such conduct is substantially certain to result in emotional harm to the adopting parents. This is particularly so when they have specifically advised a defendant of their physical inability to care for children with special needs. In the circumstances presented, a reasonable person crediting plaintiffs' version of events could find that defendants knowingly provided false material information to plaintiffs about the adopted children and such conduct was sufficiently extreme and outrageous to support liability.

Plaintiffs have also presented enough to withstand summary judgment on their claim for negligent infliction of emotional distress. Taking the evidence in a light most favorable to plaintiffs, defendants fostered a relationship of trust with plaintiffs. Defendants assured plaintiffs that they

could rely on defendants' superior contacts and access to important information and led plaintiffs to do so in a critical transaction in which plaintiffs were particularly dependent and vulnerable. As a result of defendants' material misrepresentations, plaintiffs suffered emotional harm with various physical manifestations. See Redland Soccer Club v. Dept. of Army, 55 F.3d 827, 848 (3d Cir. 1995); Brown v. Philadelphia College, 674 A.2d 1130, 1135-36 (Pa. Super. 1996).

Emotional distress damages, of course, would also be recoverable under plaintiffs' misrepresentation claims. See MacGregor v. Mediq, Inc., 576 A.2d 1123, 1127 (Pa. Super. 1990).

ACCORDINGLY, this day of July, 1999, upon consideration of the Living Bridges defendants' Motion for Summary Judgment (Doc. #27) and plaintiffs' response, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in part as to the claim in Count II for Negligent Nondisclosure and said Motion is otherwise **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.